Supreme Court, U.S.
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No. 99-635

In The

Supreme Court of the United States

JAYSON SEPE,

Petitioner,

v.

MCDONNELL DOUGLAS CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

Petitioner properly listed the Parties in his Petition. Respondent McDonnell Douglas Corporation is a wholly owned subsidiary of The Boeing Company. McDonnell Douglas Corporation does not have any subsidiaries that are not wholly-owned.

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STATEMENT OF THE CASE

Petitioner Jayson Sepe ("Sepe") brought a claim of retaliation against Respondent McDonnell Douglas Corporation ("MDC"), pursuant to the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* Sepe, a union employee, formerly worked at MDC as a builder/mock-up and tooling. MDC discharged Sepe after he admittedly engaged in self-employment during a leave of absence. More specifically, Sepe took a leave of absence from his work at MDC at the time of the birth of his daughter. While on this leave, Sepe worked for his own excavation business during what would have been his normal shift at MDC. The collective bargaining agreement ("CBA"), that dictated the terms and conditions of Sepe's employment with MDC, specifically mandated Sepe's discharge in that circumstance.

Sepe was hired by MDC in April 1984. Sepe's positions with MDC were union positions, and Sepe was a member of the International Association of Machinists and Aerospace Workers, District Lodge 837 ("Machinists" or "Union"). Article VII, Section 7 of the CBA in effect at the time of Sepe's discharge provides as follows:

> An employee accepting other employment or engaged in business for himself while on leave of absence **shall be discharged** by the Company unless the Union and the Company have jointly, prior to the commencement of such leave of absence, agreed in writing that it could be done.

(emphasis supplied). MDC's General Operating Procedures ("GOP") contains similar language prohibiting employment while on leave. In relevant part, Paragraph 3 provides as follows:

> Employees accepting other employment or engaging in self-employment while on authorized leave of absence **will be terminated** by the Company unless written authorization has been granted by the Manager-Employee Records prior to commencement of the LOA

(emphasis supplied).

In May of 1995 Sepe requested and took a 12-week leave of absence for the birth of his daughter. Because of the numerous other leaves of absence he had taken, as well as his otherwise spotty attendance record, Sepe had not worked 1,250 hours in the 12-month period preceding his May 1995 request for leave. In fact, Sepe had worked only 822 hours during the 12-month period preceding his leave. Therefore, he was not entitled to leave under the FMLA, which requires an employee to have worked at least 1,250 hours in the previous 12-month period. 29 U.S.C. § 2611(2)(A).

MDC's own family and medical leave policy, however, was more generous than the FMLA. That is, under the MDC family leave policy in existence at the time, which does not completely mirror the FMLA, Sepe was allowed to take 12 weeks of leave for the birth of his daughter even though he had worked only 822 hours in the previous 12 months. Accordingly, Sepe was granted leave.

MDC learned that Sepe engaged in other work during the leave, a fact which Sepe freely admitted. Sepe also admitted that his supervisor cautioned him to seek approval if he was planning to work during his leave. Sepe ignored this advice and did not seek the written permission (from MDC or the Union) required by the

CBA and GOP that would have allowed him to engage in other work during the leave. Sepe admitted that he worked during other non-FMLA leaves of absence as well. As a result, after investigating the matter, MDC terminated Sepe's employment.

After his discharge, Sepe filed a complaint with the United States Department of Labor ("DOL"), the administrative agency charged with enforcement of the FMLA. The DOL investigated Sepe's claim and found that MDC had not violated the FMLA.[1]

Sepe also filed a grievance pursuant to the terms of the CBA to contest his discharge. At the hearing on his grievance, Sepe admitted that he worked while on leave. MDC denied Sepe's grievance, and, subsequently, the Union withdrew the grievance.

Sepe then filed this lawsuit in the United States District Court for the Eastern District of Missouri. The District Court granted MDC summary judgment. The District Court first found that since Sepe had not worked the requisite 1,250 hours in the 12-month period preceding the May 1995 leave, he was not entitled to protection under the FMLA. In addition, the District Court further

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[1] The FMLA implementing regulations specifically provide that an employer's other policies remain in effect during an FMLA leave, including policies regarding outside employment. *See* 29 C.F.R. § 825.312(h) ("If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave"); *see also* 29 U.S.C. § 26149(a)(3)(B); and 29 C.F.R. § 825.216(a). Accordingly, since Sepe violated MDC's established policy, MDC did not violate the FMLA by terminating his employment.

found that Sepe failed to present any evidence that MDC's stated basis for discharging him was a pretext for FMLA retaliation. Finally, the District Court found that Sepe was discharged, not for taking leave, but for admittedly violating the policy of MDC – and his own Union – by working at another job while on leave without permission.

Sepe filed an appeal with the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit"). The Eighth Circuit affirmed the District Court's decision. Although the Eighth Circuit noted that Sepe failed to qualify for leave under the FMLA because he had not worked the requisite hours, it declined to rule specifically upon Sepe's status as an eligible employee. Instead, the Eighth Circuit affirmed the District Court because it agreed that Sepe lacked any evidence that he was discharged from MDC in retaliation for having exercised any FMLA rights:

> Because Sepe worked only 822 hours during the year preceding his request for leave, he does not qualify as an "eligible employee" and therefore is not entitled to FMLA protection . . . .**We need not grapple with the question whether the regulation in question grants rights greater than those conferred by the FMLA, for we agree with the district court that Sepe was fired because he had violated the terms of the CBA and not in retaliation for having exercised any rights under the FMLA**. Sepe does not dispute that he engaged in "other employment" by working at J&K while on leave. Thus, McDonnell Douglas was within its rights – indeed, was required to under the terms of the CBA – to fire

> Sepe after he engaged in such employment without written permission to do so.

(emphasis supplied); Eighth Circuit Decision at 4-5. Accordingly, the Eighth Circuit found that Sepe failed to carry his burden of establishing the third prong of the prima facie case – a causal connection between his exercise of rights and his discharge.

This Court should deny Sepe's petition for a writ of certiorari. The Eighth Circuit and the District Court properly dismissed Sepe's claim. In addition, Sepe's petition does not raise important issues that this Court should address, or otherwise set forth compelling reasons warranting grant of a writ of certiorari. If accepted for review, this case would involve matters relevant and applicable only to the parties in this case. Therefore, Sepe's petition should be denied.

REASONS FOR DENYING PETITION FOR A WRIT OF CERTIORARI

Sepe's petition for a writ of certiorari should be denied because Sepe has not asserted sufficient grounds to justify review by this Court. Supreme Court Rule 10 states that this Court will grant a writ of certiorari "only for compelling reasons," and sets out such circumstances. Sepe's arguments in his petition do not present compelling reasons, and do not otherwise warrant granting him a writ of certiorari.

Sepe seems to argue three grounds in seeking a writ of certiorari: (1) the Eighth Circuit failed to determine whether Sepe established a prima facie case of retaliation

under the FMLA; (2) this Court should review FMLA implementing regulation 29 C.F.R. § 825.110(d); and (3) the Eighth Circuit failed to address the issue of pretext regarding Sepe's retaliation claim. At best, Sepe asserts that the lower courts misapplied rules of law. This Court will "rarely" grant a petition for a writ of certiorari for allegations of misapplication of a properly stated rule of law. S. Ct. R. 10. The circumstances here do not warrant an exception. Accordingly, Sepe's petition should be denied.

1. Sepe's contention that the Eighth Circuit failed to initially find that Sepe established a prima facie case of retaliation under the FMLA is not only an insufficient basis for granting a writ of certiorari, but it is also factually incorrect.

Sepe's contention that the Eighth Circuit failed to find that he had established a prima facie case of retaliation under the FMLA is an insufficient basis for granting a writ of certiorari. Sepe's argument merely disputes the Eighth Circuit's application of the indirect, burden-shifting legal analysis to his retaliation claim, which is an insufficient basis for granting a writ of certiorari. S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").[2]

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[2] The fact that the Eighth Circuit may not have affirmatively stated the appropriate rule of law in its decision is not significant. The District Court set out the rule of law, which decision the Eighth Circuit affirmed.

Moreover, Sepe's contention is wrong. The Eighth Circuit was not required to address specifically the prima facie elements in disposing of Sepe's retaliation claim. An appellate court is not required to regurgitate a lower court's analysis, or rule upon unnecessary issues. *Zotos v. Lindbergh School Dist.*, 121 F.3d 356, 362 (8th Cir. 1997) (appellate court may affirm district court's decision on any basis supported by record); *Ostrzenski v. Seigel*, 177 F.3d 245, 253 (4th Cir. 1999) (holding similarly); *Harper v. Showers*, 174 F.3d 716, 718, n. 3 (5th Cir. 1999) (holding similarly). This rule applies equally before this Court. *Oklahoma v. United States Civil Serv. Com'n*, 330 U.S. 127, 134, n. 3 (1947) ("A respondent can support his judgment on any ground that appears in the record").

The District Court properly applied the indirect, burden-shifting legal analysis to Sepe's retaliation claim. The District Court found that Sepe's claim failed at both the prima facie case stage, and the ultimate stage of presenting evidence of pretext (and intentional retaliation). In its decision, the Eighth Circuit abstained from ruling upon the first element of the prima facie case (eligibility for protection from retaliation) and instead based its decision upon the third prima facie element (Sepe's failure to demonstrate a causal connection between the alleged protected activity and the adverse action).

The Eighth Circuit expressly agreed with the District Court that Sepe failed to demonstrate that he was the victim of retaliation for exercising rights encompassed by the FMLA: " . . . we agree with the district court that Sepe was fired because he had violated the terms of the CBA and not in retaliation for having exercised any rights

under the FMLA." Eighth Circuit Decision at 4. In agreeing with the analysis of the District Court, the Eighth Circuit correctly applied the appropriate legal standard.

2. Sepe's argument that this Court should review FMLA implementing regulation 29 C.F.R. § 825.110(d) is also insufficient grounds for granting him a writ of certiorari. The regulation is not at issue and otherwise is not ripe for review by this Court.

As a bootstrap argument, Sepe also suggests that this Court should grant him a writ of certiorari in order to review 29 C.F.R. § 825.110(d), a regulation implementing the FMLA.[3] According to Sepe, 29 C.F.R. § 825.110(d) operates to expand the coverage of the FMLA even though Sepe does not deny that he failed to work the requisite number of hours necessary to qualify for FMLA leave. This regulation, however, is not at issue in this case, and thus is not properly before this Court.

The Eighth Circuit specifically declined to review 29 C.F.R. § 825.110(d), as well as its application to Sepe's

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[3] 29 C.F.R. § 825.110(d) states, in relevant part: "The determination of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences . . . If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave." Sepe argued unsuccessfully in the District Court that this regulation expands coverage of the FMLA and entitles him to FMLA coverage, thus satisfying the first element of his prima facie case of retaliation.

case: "We need not grapple with the question whether the regulation in question grants rights greater than those conferred by the FMLA . . . " Eighth Circuit Decision at 4. Therefore, the validity of the regulation is not before this Court. *See, e.g., Immigration and Naturalization Serv. v. National Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) ("We also note that, in invalidating the contested regulation, the Court of Appeals relied solely on statutory grounds, and did not reach the plaintiffs' constitutional challenge . . . Accordingly, only the plaintiffs' statutory challenge is before us and we resolve none of the constitutional claims raised by the plaintiffs' initial complaint").[4]

Furthermore, there is no compelling reason for this Court to review the regulation. Contrary to Sepe's implication, there is no conflict among the federal circuit courts of appeal regarding the interpretation and enforceability of 29 C.F.R. § 825.110(d). Indeed, very few decisions have even mentioned 29 C.F.R. § 825.110(d), and in even fewer decisions has the interpretation and enforceability of the regulation been at issue. *See, e.g.,*

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[4] Sepe incorrectly states that the Eighth Circuit found that he was not covered by the FMLA during the relevant time. Sepe's Petition at 4, states: "The Eighth Circuit Court of Appeals decided Sepe was not eligible [for FMLA leave] because the act requires 1250 hours worked in the twelve month period preceding the leave". The Eighth Circuit, as quoted above, specifically did not rely upon the FMLA eligibility issue.

Douglas v. E.G. Baldwin & Assoc., Inc., 150 F.3d 604, 607-08 (6th Cir. 1998); and *Seaman v. Downtown Partnership of Baltimore, Inc.*, 991 F. Supp. 751 (D. Md. 1998). The matter is simply not ripe for this Court's review. *Vasquez v. United States*, 454 U.S. 975, 976 (1981) ("Often the law develops in a more satisfactory fashion if this Court withholds review of novel issues until differing views have been expressed by other federal courts").

Further, the lower courts that have reviewed the regulation have ruled similarly, finding that it does not expand the FMLA's coverage. *See Douglas*, 150 F.3d at 607-08 ("If the Court were to exercise jurisdiction where the employer does not meet the statutory prerequisite, it would effectively be expanding the scope of the [FMLA], and the scope of our limited jurisdiction as defined by Congress, by judicial decree . . . This we do not have the power to do"); and *Seaman*, 991 F. Supp. at 754 (in rejecting FMLA claim where employer granted FMLA leave to plaintiff who had not worked the requisite hours to be eligible employee under FMLA, the court stated "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress") (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

In fact, in the lone case relied upon by Sepe in asserting a "conflict" among the courts regarding 29 C.F.R. § 825.110(d) – the *Wolke* decision – the court agreed that only Congress may alter the coverage of the FMLA. *Wolke v. Dreadnought Marine, Inc.*, 954 F. Supp. 1133, 1136 (E.D. Va. 1997) ("Congress left no explicit or implicit gap for the [DOL] regulations to fill, and employees should

only receive the protections of the FMLA if they have worked twelve months and the requisite amount of time").[5]

Finally, even if the decision in *Wolke* could reasonably be read to countenance 29 C.F.R. § 825.110(d), the resulting conflict regarding the regulation exists strictly in the district courts. This Court routinely refrains from reviewing issues where a conflict in decisions exists only among district courts. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 552 (1958) (only "in very rare instances, will a conflict between a decision of the Court of Appeals and that of a district court in some other circuit suffice."). There is no split among the federal appellate courts, and there is no compelling reason to stray from precedent by addressing this issue.

3. Plaintiff's final argument, that the Eighth Circuit failed to address the pretext issue of his retaliation claim, is both an insufficient ground for granting a writ of certiorari, and is factually incorrect.

It is now well-settled that even if Sepe had established a prima facie case of retaliation (and he did not), that doing so would not entitle him to a jury trial, but

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[5] In *Wolke*, the United States District Court for the Eastern District of Virginia merely suggested the potential applicability of an estoppel theory under certain circumstances. That court's later decision in *Barron* completely undermines Sepe's attempt to base his claim on a false conflict with the *Wolke* decision. Indeed, after *Barron*, there is no split even in the Eastern District of Virginia, let alone among federal courts of appeal. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

would merely shift the burden to MDC. To meet its burden at this stage, MDC needs only to articulate a legitimate, nondiscriminatory reason for Sepe's discharge. Sepe has not (and cannot) argue that MDC failed to meet its burden. MDC's legitimate reason for discharging Sepe – that he worked on another job during his leave – is not in dispute. Once MDC meets its burden, Sepe needs to establish both that MDC's offered reason is false and that the true reason Sepe was discharged was in retaliation for taking the FMLA leave.

Sepe incorrectly argues that his petition for a writ of certiorari should be granted because the Eighth Circuit failed to address the issue of pretext regarding his retaliation claim. Petition at 6. ("The result to Sepe is . . . he has been denied the opportunity to show MDC's stated reason for terminating him was pretextual"). As with his first argument, this claim is nothing more than an assertion that the Eighth Circuit misapplied the indirect, burden-shifting legal analysis. Misapplication of the law is not sufficient grounds to grant a writ of certiorari. S. Ct. R. 10.

In addition, Sepe's argument in this regard is factually incorrect. The Eighth Circuit unequivocally found – just as the District Court had – that Sepe failed to demonstrate that his discharge was pretextual:

> We agree with the district court that Sepe was fired because he had violated the terms of the CBA and not in retaliation for having exercised any rights under the FMLA. Sepe does not dispute that he engaged in "other employment" by working at J&K while on leave. Thus, McDonnell Douglas was within its rights – indeed, was

> required to under the terms of the CBA – to fire Sepe after he engaged in such employment without written permission to do so.

Eighth Circuit Decision at 4-5; *see also* District Court Decision at 12-13.[6] As noted by both the District Court and the Eighth Circuit, Sepe **admitted** that he worked during his leave, which was an unequivocal violation of the CBA, and was the basis for Sepe's discharge. Given Sepe's admission, the grounds for his discharge can hardly be pretextual.

In summary, Sepe failed to establish both his prima facie case of retaliatory discharge and his burden to show pretext. Both the United States District Court for the Eastern District of Missouri and the Eighth Circuit properly considered and dismissed his lawsuit. Sepe's petition is but a request that this Court re-examine facts specific to

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[6] As discussed previously, the Eighth Circuit is not required to restate the District Court's analysis, but can merely affirm the District Court's decision, which the Eighth Circuit did here. Plaintiff's attempted reliance upon *Hodgens v. General Dynamics Corp.*, 144 F.3d 151 (1st Cir. 1998), evidences the weakness of his argument. *See* Petition at 6, n. 1. In *Hodgens* – just as the Eighth Circuit found in this case with Sepe – the Court of Appeals for the First Circuit affirmed summary judgment for the employer, finding that the plaintiff lacked any evidence that his discharge was a pretext for FMLA retaliation. *Id.* at 169-72. The *Hodgens* case also illustrates the futility of Sepe's contention that he established a prima facie case of retaliation. Although the plaintiff in *Hodgens* established a prima facie case of retaliation, summary judgment for the employer was still warranted due to the lack of evidence of pretext and intentional retaliation (just as in this case), rendering the establishment of the prima facie case effectively moot.

this case, and re-analyze them under well-established, and undisputed, rules of law. The Court should not utilize its limited resources to indulge Sepe under these circumstances, where the Court's efforts will have no impact beyond the parties themselves: " . . . this Court does not sit to satisfy a scholarly interest . . . Nor does it sit for the benefit of the particular litigants." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955); *see also id.* at 79 ("it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . " (quoting *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 [1923]).

Accordingly, the Court should deny Sepe's petition.

CONCLUSION

For each of the reasons set forth in MDC's brief, this Court should deny Sepe's Petition for Writ of Certiorari.

Respectfully submitted,

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